"When is the General Education Setting Not Appropriate?": What to Consider When Addressing the Least Restrictive Environment and the Continuum of Placements

Cynthia Buechler
Attorney at Law
Buechler & Associates, P.C.

1

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

The student has the disabilities of Down Syndrome, ADHD, Asthma, and Speech. When the student began kindergarten, there were significant behaviors. An FBA was conducted and a BIP was put in place.

In first grade, there was inadequate progress and the ARD committee recommended more inclusion support and resource for math and reading, movement breaks and 20 minutes a week of social skills.

The parent requested an IEE for the FBA. The BCBA who completed the FBA largely agreed wit the district's BIP.

2

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

In March, two ARD meetings were held: the reconvene and the annual ARD meeting. The ARD committee recommended that part or all of the student's day be in the special education setting. They recommended increased resource time, double inclusion support and half of speech provided in the special education setting. Parent disagreed.

3

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

In 2nd grade, the ARD committee met and significantly increased inclusion support and provide more movement breaks. However, the student was not making adequate progress. The committee lowered the mastery criteria on the goals and objectives and increased special education instruction.

4

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

Based upon daily data gathered, another ARD meeting was held in March and the committee recommended placement in the Essential Academics self contained setting. The reasons for the placement recommendations were the following:

1. The student was not meeting the IEP goals and objectives;
2. the student was performing significantly below grade;
3. modifications made eliminated the essential components of the curriculum;
4. behavior was impeding the participation in class; and
5. the speech impairment necessitated a less distracting environment.

Parent filed for a due process hearing.

5

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

This case revolves around the least restrictive environment/ mainstreaming inquiry.

The Court found that the student's IEP was undoubtedly individualized. Between kindergarten and the beginning of her third-grade year, the ARD developed at least ten IEPS and/or IEP amendments. These IEPs accounted for an FIE, FBAs and corresponding BIPs, and numerous progress reports. The ARD showed that it was vigilant in its evaluation, observation, and assessment of the student and that it routinely updated the student's IEP to reflect its individualized findings.

6

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

The ARD overseeing the student's IEPs was also comprised of key stakeholders who collaborated to reach the best possible decisions for H.W. For example, the ARDC members and participants who reviewed the proposed blended placement IEP were the student's grandmother, a campus administrator, two general education teachers, a special education teacher, a licensed specialist in school psychology, two speech-language pathologists, an occupational therapist, a behavioral specialist, a coordinator for elementary special education services, and two parent advocates. This composition was common as a variety of family members, educators, specialists, and administrators frequently comprised the student's ARD.

7

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

When the issue before the Court is whether the Act's mainstreaming requirement has been met, the first question that must be asked is "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child." *Daniel R.R.*, 874 F.2d at 1048 (citing § 1412(5)(B)).

If the answer is no, and the school "intends to provide special education or to remove the child from regular education," the next question is "whether the school has mainstreamed the child to the maximum extent appropriate."

8

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

The Court held that a variety of factors must be considered at each stage of this inquiry, though the factors are by no means exhaustive, nor a single factor dispositive. Rather, each case must be reviewed through an "individualized, fact-specific inquiry."

9

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

When deciding "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child, several non-exhaustive factors need to be considered. Those factors include:

1. Whether the school has taken steps to accommodate the child with a disability in regular education
2. Whether the child will receive an educational benefit from regular education;
3. The child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child; and
4. What effect the disabled child's presence has on the regular classroom environment and, thus, on the education that the other students are receiving.

10

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

The Court held that it was apparent from the record that the District tried to accommodate the student in the general education setting. The Court further answered the second question and found the District's efforts were sufficient. The District provided H.W. with an FIE before she started kindergarten and, based on the results, implemented a modified curriculum with inclusion support and therapy. After noticing behavioral issues, it ordered an FBA, developed a BIP, and amended her IEP to address those issues. The ARDC also further modified the student's curriculum while keeping her in general education.

11

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

Throughout the student's first- and second-grade years, the ARDC repeatedly amended the student's IEP to address her inadequate progress. It kept her in general education while:

- increasing her inclusion support, resource room time, and special education components;
- addressing her behavioral problems; and
- providing her with ESY services.

12

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

It was only after multiple attempts at keeping the student in a general education classroom that the District proposed the blended placement IEP. The District provided the student with individualized, one-on-one care that it frequently adapted to meet her evolving needs.

13

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

The next factors to consider are:

1. Whether the student was receiving an educational benefit from the District's efforts; and
2. The student's overall experience in general education when "balancing the benefits of regular and special education for her.

14

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

To determine whether the student was receiving an educational benefit in general education, the Court focused on her "ability to grasp the essential elements of the regular education curriculum." This means that one must "pay close attention to the nature and severity of the student's disability as well as to the curriculum and goals of the regular education class." It is insufficient that the student received a "de minimis" educational benefit; instead the student needs to "progress appropriate in light of the student's circumstances."

15

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

This leads us to the critical question in this case: how should progress be measured?

For a child fully integrated into general education, an IEP is appropriate when it is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." If grade-level enhancement is not a reasonable prospect for the child, then the educational program for a disabled student must be appropriately ambitious in light of the child's circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom." (*Endrew F.*, 137 S. Ct. at 1000).

16

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

This does not mean that grade-level advancement and tests scores cannot be considered when determining whether a student in the second category is appropriately progressing. Advancement and test scores are still valid, important metrics that we can consider.

It simply means that test scores and advancement from grade to grade are not per se indicators for either removal or the provision of a FAPE.

17

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

We cannot predicate access to regular education on a child's ability to perform on par with typically developing peers. However, mainstreaming would be pointless if instructors were required to modify the regular education curriculum to the extent that the child with a disability is not required to learn any of the skills normally taught in regular education.

The Fifth Circuit precedents—and the Supreme Court's for that matter—favor an overall academic record-based review.

18

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

To make this judgment, we must look to her overall academic success, not whether her disability has been remedied. The extent to which the student has progressed on her IEP goals and objectives, as well as her test scores and percentile rankings, can aid this process, but no one factor can overwhelm it.

19

H.W. v. Comal ISD, No. 21-50838 (5th Cir. 2022)

The Court held that while we cannot affirm the District's proposed blended placement IEP simply because the student was falling behind her typically developing peers, we can do so if we agree that her "individual needs" make removal appropriate.

Here, the district court correctly reviewed the student's overall academic record and found that she was not making appropriate progress in light of her circumstances. Indeed, that record—which includes test scores, percentile rankings, IEP progress reports, testimony from qualified professionals, and the like—reveals that the student could not "grasp the essential elements of the regular education curriculum.

20

A.A. ex rel. K.K. v. Northside ISD 951 F.3d 678 (5th Cir. 2020)

Student is a child diagnosed with serious emotional disturbance and other disabilities, eligible for special education and related services pursuant to the IDEA. Over the years, Student has received several diagnoses of different mental disabilities from a variety of medical and mental health professionals. Those diagnoses include, inter alia , Pediatric Bipolar 1 Disorder (Severe with Psychotic symptoms); an unspecified disorder along the Autism Spectrum, ADHD/Combined type (Severe); Mood disorder; and an unspecified language disorder. Between the ages of three and seven, Student had been hospitalized eight times.

21

A.A. ex rel. K.K. v. Northside ISD 951 F.3d 678 (5th Cir. 2020)

Prior to Student's enrollment in NISD, Student was enrolled in Klein ISD, where he attended the Klein Therapeutic Education Program, a self-contained campus.

In February 2016, the ARD Committee met and determined that he would receive three hours of specialized behavior support per week per course in a self-contained setting.

22

A.A. ex rel. K.K. v. Northside ISD 951 F.3d 678 (5th Cir. 2020)

Student returned to NISD in August 2016 and began the fourth grade at Timberwilde Elementary School. He was initially placed in an Applied Learning Environment ("ALE") classroom. It was during this year that Student was hospitalized 81 out of the 176 days of the regular 2016–2017 academic year. As a result, Student only attended NISD about 46 days during the entire 2016–2017 academic year.

23

A.A. ex rel. K.K. v. Northside ISD 951 F.3d 678 (5th Cir. 2020)

On October 11, A few weeks later, the ARD Committee changed Student's classroom setting to a Behavior Mastery Content ("BMC") classroom with the support of an instructional assistant.

On November 3rd, Student was privately hospitalized at Clarity Child Guidance Center for suicidal/homicidal ideation for 13 days. Upon his discharge from Clarity on November 16, Student was readmitted there the next day.

24

A.A. ex rel. K.K. v. Northside ISD 951 F.3d 678 (5th Cir. 2020)

On December 1, 2016, the parent placed the Student in the San Marcos Treatment Center for 34 days. The Student returned to NISD at the Holmgreen Center. On March 30, the parent received an email from the Student's teacher, informing her that the Student would be moved to a classroom with fourth and fifth grade students on the following Monday because the school was expecting several new students to arrive the following week to her classroom.

25

A.A. ex rel. K.K. v. Northside ISD 951 F.3d 678 (5th Cir. 2020)

The parent requested a due process hearing seeking residential placement and alleged several procedural violations, including that the change in classrooms required an ARD meeting.

The Court held that none of these incidents amount to a procedural violation of the IDEA on the part of NISD. The Court found that while the IDEA does mandate that parents be involved in the decision regarding a child's educational placement, the Court stated that a change between classrooms and teachers within a school does not amount to an "educational placement" within the meaning of the statute.

26

A.A. ex rel. K.K. v. Northside ISD 951 F.3d678 (5th Cir. 2020)

The Court held that one "must identify, at a minimum, a fundamental change in, or elimination of a basic element of the education program in order for the change in classrooms to qualify as a change in educational placement change.

27

Question & Answer Session

28

Disclaimer

The legal information provided during this webinar is for general purposes only. It is not intended as a substitute for individual legal advice or the provision of legal services. Accessing this information does not create an attorney/client relationship. Individual legal situations vary greatly and attendees should consult directly with an attorney.

29